

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CITY OF HOPE NATIONAL MEDICAL
CENTER,

Employer/Petitioner,

and

UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY
ALLIED-INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION, AFL-
CIO/CLC,

Union,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION—UNITED HEALTHCARE
WORKERS WEST,

Intervenor.

Case No. 21-UC-249611

**UNION'S STATEMENT IN
OPPOSITION TO INTERVENOR'S
REQUEST FOR REVIEW**

RYAN SPILLERS
MORGAN JOHNSON
GILBERT & SACKMAN
A LAW CORPORATION
3699 Wilshire Boulevard, Suite 1200
Los Angeles, CA 90010-2732
Telephone: (323) 938-3000
Facsimile: (323) 937-9139
Email: rspillers@gslaw.org
mjohnson@gslaw.org

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	4
A.	Nourishing Hope Provides Food Services to City of Hope’s Duarte Campus	4
B.	UHW’s Unit at City of Hope Consists of Nonprofessional, Technical, Professional, and Skilled Maintenance Classifications	5
C.	The FSEs Have a Lengthy Bargaining History with USW.....	5
D.	City of Hope Hired Substantially All of the Incumbent FSEs into the Same Positions at Nourishing Hope	6
E.	The FSEs’ Working Conditions Did Not Change.....	7
III.	ARGUMENT	8
A.	UHW’s Challenge to the Regional Director’s Finding that UHW’s Existing Unit Is Nonconforming to the Health Care Rule Does Not Warrant Review of the Regional Director’s Decision Because the Regional Director’s Finding Is Not Clearly Erroneous and UHW Has Not Challenged the Regional Director’s Separate Basis for Finding the Health Care Rule Inapplicable Here.....	10
1.	The Regional Director Properly Found that UHW’s Existing Unit Is Nonconforming	11
a)	UHW’s Unit Does Not Include All Nonprofessional Classifications at City of Hope.....	14
b)	UHW’s Unit Includes Some but Not All Professional Classifications	16
c)	UHW’s Unit Includes Skilled Maintenance Classifications.....	19
B.	The Regional Director Properly Found that the Health Care Rule Does Not Apply Because This Is Not an Initial Organizing Attempt or a Petition for a New Unit of Previously Unrepresented Employees, and UHW Has Not Challenged this Finding	20

C.	Because the Regional Director Did Not Rely upon the “Extraordinary Circumstances” Exception to the Health Care Rule, UHW’s Challenge on that Basis Is Unavailing	21
IV.	CONCLUSION.....	21

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

29 CFR § 103.30	10
29 CFR § 103.30(a).....	11
29 CFR § 103.30(c).....	20
29 U.S.C. § 159(c)(1)(A)(i)	10
29 U.S.C. § 159(c)(1)(B)	10

NLRB CASES

<i>Baptist Mem'l Hosp.</i> , 225 NLRB 1165 (1976)	15
<i>Barnett Memorial Hospital Center</i> , 217 NLRB 775 (1975)	14, 16
<i>Crittenton Hosp.</i> , 328 NLRB 879 (1999)	12, 20
<i>Group Health Ass'n, Inc.</i> , 317 NLRB 238 (1995)	17, 18
<i>Jewish Hosp.</i> , 305 NLRB 955 (1991)	19
<i>Kaiser Found. Hosp.</i> , 312 NLRB 933 (1993)	12, 20
<i>Meriter Hospital, Inc.</i> , 306 NLRB 598 (1992)	14
<i>Pathology Institute</i> , 320 NLRB 1050 (1996)	11
<i>Specialty Hosp. of Washington-Hadley, LLC</i> , 357 NLRB 814 (2011)	13, 14
<i>St. Barnabas Hosp.</i> , 283 NLRB 472 (1987)	16, 17

<i>St. Mary’s Duluth Clinic Health System,</i> 332 NLRB 1419 (2000)	12
--	----

<i>Trinity Memorial Hospital of Cudahy,</i> 219 NLRB 215 (1975)	14
--	----

OTHER AUTHORITIES

GC Memorandum 91-4, “Health Care Unit Placement Issues” (June 5, 1991).....	15
---	----

I. INTRODUCTION

This matter is before the Board on the Service Employees International Union, United Healthcare Workers-West's ("UHW" or "Intervenor") Request for Review ("Request") of the Regional Director's January 15, 2020 Decision and Order Clarifying Unit ("Decision") concerning the unit-clarification petition filed by the City of Hope National Medical Center ("Employer," "Petitioner," or "City of Hope").¹ The Employer did not file a request for review. The Regional Director's Decision clarified United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers International Union, AFL-CIO/CLC ("USW" or "Union") as the proper representative of the food service employees ("FSEs") at City of Hope. Pursuant to Sections 102.69(c)(2) and 102.67(f) of the Board's Rules and Regulations, the Union submits this statement in opposition to the Intervenor's request for review.

USW has represented the food service workers at City of Hope for the last fifteen years. Nearly all of these workers were retained by City of Hope when City of Hope brought the food service department in-house from an outside contractor, Sodexo, Inc. ("Sodexo"), on September 30, 2019. There was no significant change in their duties or the nature of the activities of their department when they transitioned from Sodexo to City of Hope. This is a straightforward successorship situation.

The Regional Director properly denied UHW's claim in this case that the food service workers should have been accreted to UHW's bargaining unit upon City of Hope's insourcing of the food service department. Accretion is disfavored under Board law and is appropriate only when the employees sought to be accreted have little or no separate group identity and share an

¹ UHW in its Request for Review incorrectly claimed that USW filed the unit clarification petition on October 4, 2019. USW did not. The Employer filed the petition. *See* BX 1(a).

overwhelming community of interest with the preexisting unit.² UHW presented no witnesses in this hearing. It failed to show anything close to an overwhelming community of interest between its existing unit and the FSEs, or that the FSEs have little or no separate group identity. Nor could it. These two groups – the food service workers, on the one hand, and UHW’s existing unit, on the other – have existed separately for two decades and have little in common. As the Regional Director recognized in his Decision, the criteria for an accretion are not satisfied here. UHW has not challenged this conclusion of the Regional Director.

Nor does the Board’s Health Care Rule (“Rule”) mandate that the food service workers be added to the existing UHW unit. As the Regional Director found, the Rule has no application here because this is not an initial organizing attempt or a petition for a new unit of previously unrepresented employees, and because UHW’s existing unit is non-conforming. *See* Decision at 7-8. In addition, the continued existence of City of Hope’s food service workers as a separate bargaining unit does not risk a proliferation of units, the concern that animates the Board’s Health Care Rule, because these workers have been in a separate bargaining unit for fifteen years. Accordingly, there is no increased risk of disruption of health care to patients if the food service workers continue to operate as a standalone unit.

UHW has not presented any compelling reasons to disturb the Regional Director’s findings and conclusions. While it challenges the Regional Director’s finding that UHW’s existing unit is non-conforming, it presented no evidence that its existing unit *is* conforming, and the evidence that USW presented supports the Regional Director’s conclusion. UHW accordingly cannot show that the Regional Director’s finding was clearly erroneous. Moreover, UHW has not challenged the Regional Director’s other basis for determining that the Health

² *See, e.g., Safeway Stores*, 256 NLRB 918 (1981); *E.I. Du Pont de Nemours*, 341 NLRB 607, 608 (2004); *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003).

Care Rule does not mandate the accretion of food service workers into UHW's existing unit: that this is not an initial organizing campaign. *See* Decision at 6.³ The Regional Director's decision can be upheld on those grounds without even considering the first basis of UHW's request for review.

The second basis of UHW's Request for Review – that the Regional Director erred in finding “extraordinary circumstances” to justify his conclusion that USW is the appropriate representative of the food service workers – is irrelevant because this was not a basis for the Regional Director's decision. While USW contends that extraordinary circumstances would justify its recognition as the representative of the food service workers if the Rule had application here, the Regional Director did not reach that issue because he found that the Rule was inapplicable since UHW's existing unit is nonconforming and because this is not an initial organizing campaign. *See* Decision at 6. Accordingly, the second basis of UHW's request for review does not provide grounds for disturbing the Regional Director's decision.

The Regional Director properly concluded that USW should continue to represent the food service employees as it has for the last fifteen years, and UHW has provided no compelling reasons to conclude otherwise. Accordingly, UHW's petition for review should be denied.

³ Citing *Crittenton Hosp.*, 328 NLRB 879, 880 (1990), *Kaiser Foundation Hospitals*, 312 NLRB 933 (1993), and *St. Mary's Duluth Clinic Health Sys.*, 332 NLRB 1419, 1421 (2000), the Regional Director noted that “the Rule applies only to initial organizing attempts or, where there are existing nonconforming units, to a petition for a new unit of previously unrepresented employees, which would be an addition to the existing units at the employer's facility,” and that “the Rule's intent is not the abandonment and replacement of historical units to conform with the eight units described in the Rule.” Decision at 6. The Regional Director concluded that “the existing UHW bargaining unit is nonconforming *and* this is not an initial representation petition” before determining that it would be appropriate to recognize USW as the representative of the food service workers. *Id.* (emphasis added). The Regional Director further noted, “[a]s this matter is not one of initial representation, the existence of UHW's nonconforming unit, and in light of USW's previous long-standing bargaining history, I find in favor of recognizing USW as the bargaining representative of the job classifications that are the subject of this petition.” *Id.* at 7.

II. STATEMENT OF FACTS

A. Nourishing Hope Provides Food Services to City of Hope's Duarte Campus

City of Hope currently employs approximately 90 food service employees ("FSEs") in its internal food services department called "Nourishing Hope." BX 2, stip. 7; Tr. 157:13-18.⁴ Nourishing Hope includes retail and patient services. Tr. 48:1-13 (Eggerling). Retail services include the cafeteria, catering, a Starbucks, and the Bistro, a quick service cafe. Tr. 48:2-6 (Eggerling). The cafeteria is in a separate building and includes a kitchen for food preparation, while the Bistro is located inside one of the hospital buildings on campus. Tr. 67:19-21 (Eggerling); 108:8-13 (Goldsmith). The cafeteria, Starbucks, and Bistro are open to the public and serve patients, visitors, and staff. Tr. 86:11-19 (Eggerling). Food is prepared primarily in the main kitchen of the cafeteria, with some assembly done in the back room of the Bistro. Tr. 64:8-17 (Eggerling).

Patient services operates out of the main kitchen. Tr. 67:19-24 (Eggerling). Room service operators in the kitchen take orders from patients by phone. Tr. 87:6-8; 89:10-12 (Eggerling). Nurses or assistants may also place orders for patients if the patients are unable to do so on their own. Tr. 87:3-4; 92:2-13 (Eggerling). Food orders are filtered through the "Computrition" system, which prevents patients with dietary restrictions from ordering any restricted items. Tr. 87:10-20 (Eggerling). Outpatients follow the same or similar procedure, but there is not as much data regarding dietary restrictions for outpatients. Tr. 94:22-95:6 (Eggerling). FSEs also prepare some pre-packaged meals in the kitchen and deliver them to refrigerators at various locations throughout the hospital to provide "floor stock" for patients

⁴ Citations to the transcript are in the following format: "Tr. [page]:[line] (witness);" citations to the exhibits are as follows: Board exhibit "BX [Exhibit number]," Intervenor exhibit "IX [Exhibit number]," and Union exhibit "UX [exhibit number]."

who require food off hours – when the kitchen and cafeteria are closed. Tr. 99:4-10; 99:14-100:3 (Eggerling).

B. UHW's Unit at City of Hope Consists of Nonprofessional, Technical, Professional, and Skilled Maintenance Classifications

UHW's unit at City of Hope includes various classifications defined by the Health Care Rule including nonprofessional, technical, professional, and skilled maintenance employees. *See* BX 1(a), App. A; UX 24 (job descriptions of positions represented by UHW). As elaborated below in Section III.A.1.a-c, UHW represents some but not all nonprofessional and professional classifications at City of Hope. *See* UX 14-17 (job listing of positions not represented by UHW).

C. The FSEs Have a Lengthy Bargaining History with USW

In approximately 1999, City of Hope contracted out its food services operations to Sodexo, Inc. BX 2, stip. 14. In 2004, USW petitioned to represent the FSEs at City of Hope. UX 1 BX 2, stip. 15. USW has been the FSEs' bargaining representative since 2004. *See* UX 3 (USW certification of representative, 2004); UX 5 (USW CBA 2005-2008); UX 6 (USW CBA 2008-2011); UX 7 (USW CBA 2011-2014); UX 8 (USW CBA 2014-2015); UX 9 (USW CBA 2015-2018); UX 10 (USW CBA 2018-2021); *see also* BX 2, stip. 15-16.

Any representation by SEIU of the FSEs before City of Hope contracted out the food service work ended at the beginning of Sodexo's contract in 1999. Tr. 38:9-10 (Galarza); BX 2, stip. 14-15. SEIU did not continue to represent the FSEs after the outsourcing to Sodexo, and the FSEs were unrepresented by any union until USW filed its representation petition in 2004. *Id.*; UX 3. Neither UHW, nor its predecessor SEIU Local 399, intervened in USW's RC petition to represent the City of Hope food service workers. UX 2.

City of Hope terminated its contract with Sodexo for the food services work and began employing the FSEs directly as of September 30, 2019. UX 19 at 1; UX 21 at 7.

D. City of Hope Hired Substantially All of the Incumbent FSEs into the Same Positions at Nourishing Hope

City of Hope hired 106 employees to work at Nourishing Hope; all 106 employees initially hired were former Sodexo employees. Tr. 78:1-4 (Eggerling). At the “Food Service Town Hall Meeting” on July 26, 2019, City of Hope officially announced, in a meeting open to all food service workers, that it was terminating its contract with Sodexo for food service work and would begin employing the FSEs directly. UX 21; *see also* Tr. 110:10-16; 110:18-111:3, 111:9-13 (Goldsmith). The PowerPoint presentation which City of Hope executive Susan Ganz, director of culinary operations Christian Eggerling, and HR staff used at this meeting characterized the situation as a “transition.” UX 21 at 7-8; Tr. 111:21-113:15 (Goldsmith). On behalf of City of Hope, they announced that “[y]our role is being transitioned to City of Hope” and that “[y]ou are invited to apply” for the same or similar position at Nourishing Hope, with the leadership team remaining the same and employment beginning September 30, 2019. UX 21 at 8. Workers testified that all of their coworkers were hired. Tr. 115:24-25 (Goldsmith). The employee roster provided by City of Hope shows that every FSE in issue except the Project Coordinators and Program Specialists are former USW bargaining unit members.⁵ *See* UX 18 (City of Hope’s employee roster); UX 11 (USW’s bargaining unit list with Sodexo as of August 8, 2019).

Nourishing Hope managers that the FSEs now report to are the former Sodexo managers who were brought in-house along with the FSEs.⁶ *See* UX 21 at 8; Tr. 108:25-110:9

⁵ A single employee, Viviana Ortiz, appears on City of Hope’s roster but not on the USW bargaining unit list. *See* UX 11; UX 18. However, USW’s bargaining unit list does include a Viviana Morales. *See* UX 18. This may be the same person.

⁶ Supervisors and managers at Nourishing Hope include Silvia Galarza, Christian Eggerling, Anastacio Gonzalez, Jason Haskin, Christopher Otten, Luis Payes, Susana Rodriguez, Tala Roummani, Marciel Symes, Dino Tella, and Silvia Villa. UX 18; Tr. 32:15-17 (Galarza).

(Goldsmith). This includes Mr. Eggerling, the former Sodexo director of culinary operations and current Nourishing Hope director, who was first hired by Sodexo as a consultant in 2016. Tr: 45:20-46:12 (Eggerling).

E. The FSEs' Working Conditions Did Not Change

Nothing significantly changed for the FSEs from their final day as Sodexo employees to their first day as City of Hope employees. Tr. 115:13-15 (Goldsmith); Tr. 126:12-14 (Govea); Tr. 134:17-135:10 (Nava). Their wages, shifts, supervisors, coworkers, and job duties have remained the same through the transition. Tr. 115:16-116:2 (Goldsmith); Tr. 126:12-127:12 (Govea) 134:17-135:10 (Nava). The FSEs' health insurance and retirement benefits with Sodexo ended on September 30, 2019, when they became eligible for City of Hope benefits. *See* UX 19 at 4; UX 21 at 13-14; Tr. 116:14-18 (Goldsmith). The FSEs' management team has stayed the same, with the same supervisors and managers overseeing the same employees as under Sodexo. Tr. 108:25-110:9 (Goldsmith).

Since the transition, the FSEs continue to work with their same coworkers, who are former Sodexo employees. Tr. 116:19-119:3 (Goldsmith). They do not work with anyone outside of Nourishing Hope to complete their job duties. Tr. 119:14-19 (Goldsmith). They operate food and drink preparation equipment, but no medical equipment. Tr. 119:20-25 (Goldsmith); 129:6-11 (Govea). FSEs cover each other's shifts when necessary, but no employees outside Nourishing Hope cover shifts inside, or vice versa. Tr. 120:1-15 (Goldsmith); 129:12-25 (Govea). All the FSEs wear a uniform that reads "Nourishing Hope." Tr. 120:16-23 (Goldsmith). The uniforms do not display "City of Hope," and FSEs had been wearing these uniforms for several months as Sodexo employees before the transition. Tr. 121:8-20 (Goldsmith).

As the Regional Director found:

According to the record in this case, the food service employees' job duties, work locations, and shifts did not change much, or if any changes occurred, only with slight variations. Both former Sodexo supervisors and employees were hired by the City of Hope, resulting in the food service employees maintaining the same coworkers and supervisors throughout the transition. Food service employees continue to wear the same uniform, a Nourishing Hope shirt.[] Wages remained the same, though some benefits such as retirement plans and health insurance were not through the City of Hope.

Decision at 5-6 (footnote omitted). UHW does not challenge any of these findings by the Regional Director.

City of Hope did not recognize either USW or UHW as the FSEs' bargaining representative upon insourcing the FSEs on September 30, 2019. BX 2, stip. 10. Instead, on October 4, 2019, City of Hope filed the present unit clarification petition so that the Board could determine which union was the proper representative of its employees.⁷ On January 15, 2020, the Regional Director determined that USW continued to be the FSEs' proper bargaining representative,⁸ as accretion principles did not support extinguishing that longstanding bargaining relationship and automatically accreting the employees without an election into UHW's existing unit, as UHW sought to do.

III. ARGUMENT

The Regional Director properly clarified that USW is the exclusive bargaining representative of the food service workers based on: USW's fifteen-year history of representing these employees when they were employed by Sodexo;⁹ that USW's role as their exclusive

⁷ See *supra* note 1.

⁸ On the same day, the Regional Director issued a Corrected Decision and Order Clarifying Unit to correct a clerical error in the name of the Union and conform, instead, to the parties' stipulations concerning the Union's name. UHW inexplicably claims that the Union obfuscated concerning its legal name (*see* UHW's Request for Review at n.2), when the parties' stipulations correctly identify the Union's name, the many collective bargaining agreements between USW and Sodexo entered into evidence in this case correctly identify the Union's name, and USW subpoenaed UHW prior to the hearing under its proper legal name.

⁹ Decision at 6, 7, 8.

bargaining representative was achieved through an NLRB election;¹⁰ that 106 of the 114 culinary department positions were filled by former Sodexo employees (which included supervisory and managerial positions);¹¹ that, as a result, food service workers maintained the same coworkers and supervisors when they transitioned from Sodexo to City of Hope;¹² that the food service employees' job duties, job locations, and shifts did not significantly change when they transitioned from Sodexo to City of Hope;¹³ that food service employees continued to wear the same uniform as City of Hope employees;¹⁴ and that the food service employees' wages remained the same when they transitioned from Sodexo to City of Hope.¹⁵

The Regional Director also properly concluded that accretion of the food service employees into UHW's existing bargaining unit is inappropriate based on: the lack of employee interchange between the two groups of employees;¹⁶ the differing job skills between the two groups, which restricts any conceivable interchange between the two sets of employees;¹⁷ the lack of common supervision;¹⁸ and USW's continuous representation of the food service employees over the last fifteen years.¹⁹

¹⁰ *Id.* at 5, 6-7.

¹¹ *Id.* at 5. *See also id.* at 6 ("The food service employees, comprised almost exclusively of former Sodexo employees, have been represented by USW for approximately 15 years").

¹² *Id.* at 5 ("Both former Sodexo supervisors and employees were hired by the City of Hope, resulting in the food service employees maintaining the same coworkers and supervisors throughout the transition").

¹³ *Id.* at 5 ("According to the record in this case, the food service employees' job duties, work locations, and shifts did not change much, or if any changes occurred, only with slight variations.")

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 8. Here, the Regional Director found:

Of the roughly 75 job classifications that UHW represents, only two classifications, the dietary technician and patient care assistants, have any regular contact with a food service employees job classifications, the room service operator, for mutual work-related purposes. The food service employees' contact with UHW's bargaining unit employees is no different from their contact with visitors, patients, and other non-represented City of Hope staff.

Id.

¹⁷ *Id.*

¹⁸ *Id.* The Regional Director concluded here:

UHW does not challenge any of the foregoing factual findings. Instead, it challenges the Regional Director's finding that UHW's existing bargaining unit is nonconforming, and it claims that the Regional Director failed to find "extraordinary circumstances" to recognize USW as the food service employees' representative. As elaborated below, these are not reasons to disturb the Regional Director's decision.

A. UHW's Challenge to the Regional Director's Finding that UHW's Existing Unit Is Nonconforming to the Health Care Rule Does Not Warrant Review of the Regional Director's Decision Because the Regional Director's Finding Is Not Clearly Erroneous and UHW Has Not Challenged the Regional Director's Separate Basis for Finding the Health Care Rule Inapplicable Here

Because the standards for an accretion are not met here,²⁰ UHW has resorted to the NLRB's Health Care Rule ("Rule")²¹ to support its position. However, as the Regional Director properly concluded, the Rule does not mandate that the food service workers be added to UHW's existing unit because this is not an initial representation petition and UHW's unit does not conform to the Rule.

[T]he food service employees and UHW bargaining unit employees do not share common supervision. The lowest level of identifiable leadership between the food service employees and the UHW bargaining unit is Executive Director Susana Ganz, who is above Director of Culinary Operations Christian Eggerling. Eggerling is responsible for the food service employees and has a combination of 10 supervisors and managers that directly report to him, none of which appear to supervise UHW bargaining unit employees.

Id.

¹⁹ *Id.* In this regard, the Regional Director found that UHW's predecessor, SEIU Local 399, previously represented food service employees before the work was contracted to Sodexo, but noted that that was over 20 years ago, whereas USW has represented these employees for the last 15 years. *Id.*

²⁰ See Decision at 7-8.

²¹ The Health Care Rule is codified at 29 CFR § 103.30. It identifies eight appropriate bargaining units in acute care hospitals: (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. The rule provides that "[e]xcept in extraordinary circumstances and in circumstances in which there are existing non-conforming units," these are the only appropriate units for petitions filed pursuant to Section 9(c)(1)(A)(i) or 9(c)(1)(B) of the Act at an acute care hospital.

The Rule only applies to initial organizing attempts or petitions to represent previously unrepresented workers; as the Regional Director found, this case does not qualify given that this is not an initial organizing attempt, and the food service workers are not a previously unrepresented group. UHW has not challenged this finding. The Regional Director also properly found that the Rule is inapplicable here given that UHW's existing unit nonconforming.

1. The Regional Director Properly Found that UHW's Existing Unit Is Nonconforming

The Regional Director's first basis for declining to apply the Health Care Rule was that UHW's existing unit is nonconforming, and the Rule does not apply where there already exist nonconforming units. *See* Decision at 6-7; 29 CFR § 103.30(a), (c). UHW challenges the Regional Director's finding that its unit is nonconforming. "The Board will grant a request for review only where compelling reasons exist therefor." NLRB Rules and Regulations § 102.67(d). When the asserted basis of review is a factual finding, the challenging party must show that the Regional Director's decision is "clearly erroneous on the record" and that "such error prejudicially affects the rights of a party." *Id* at § 102.67(d)(2).

UHW cannot show that the Regional Director's finding is "clearly erroneous," a considerably high standard. At the hearing, it presented no evidence regarding the composition of its unit, conforming or otherwise, and thus has no basis to now attempt to contradict the Regional Director's finding on the matter.

At acute care hospitals with existing nonconforming units, petitions are evaluated under traditional representation principles rather than the Health Care Rule.²² *See Pathology Institute*, 320 NLRB 1050, 1051 (1996) (applying traditional representation principles in finding unit

²² Under such principles, UHW's accretion claim fails, as the Regional Director properly found. *See* Decision at 7-8. UHW has not challenged the Regional Director's analysis on this point.

remained appropriate after facility was absorbed by another of the same employer, despite drastic reduction in size of the unit, because it was an “existing nonconforming unit”); *see also Kaiser Found. Hosp.*, 312 NLRB 933, 935 (1993) (“long-standing policy of according great deference to collective-bargaining history also supports our decision not to apply the Rule automatically to preexisting nonconforming units”). When there is a nonconforming unit at an acute care hospital, additional or residual employees need not be automatically added to that unit. The Board in *St. Mary’s Duluth* reiterated that “it was not the intent of the Rule to require the abandonment of, and replacement of, existing historical units with units that specifically conform to those set forth.” 332 NLRB 1419, 1421 (2000) (citing *Kaiser Found. Hosp.*, *supra*, and *Crittenton Hosp.*, *supra*). In particular, the Board stressed that the concern against proliferation of units must be properly “weighed against the significant, long-established policy of according deference to existing collective bargaining relationships.” *Id.* Thus, a unit of previously-represented employees within a category of the Rule may still constitute an appropriate standalone unit at an institution where another nonconforming unit already exists.

In its request for review, UHW claims that its existing unit is a conforming unit of combined technical and nonprofessional employees. A conforming unit of these categories would necessarily represent *all* of the employees in these categories at City of Hope. Despite the central importance of this issue to UHW’s argument that it should automatically accrete the FSEs without the FSEs having any say in the matter, UHW offered no evidence to support the claim that it represents all the technical and nonprofessional employees at City of Hope. The evidence that USW produced reflects that UHW’s unit actually consists of a combination of classifications under the Rule, but not all of the positions in each of those classifications.

This evidence consists of both job descriptions of UHW's represented classifications and job listings of positions at City of Hope that UHW does not represent. *See* UX 14-17; 24. UHW has not made any argument as to which categories of the Rule the job listings should fall under, if not those according to USW's analysis (which was addressed in USW's post-hearing brief and is reiterated below). It has presented no alternative analysis of either those listings or its own unit's job descriptions, other than a conclusory declaration of its unit's purported conformity. By contrast, the record evidence, discussed in more detail below, supports the Regional Director's conclusion that UHW's existing unit is nonconforming.

While UHW also suggests in its Request for Review that the Regional Director departed from Board precedent in concluding that UHW's unit is nonconforming, UHW's analysis on this point improperly conflates and misapprehends the distinction between a *conforming* unit and an *appropriate* unit.²³ *See* Request at 7-8. USW presumes that UHW is an appropriate unit for bargaining purposes. In fact, under the Health Care Rule, any appropriate unit may be stipulated between the parties, which may explain the origin UHW's own combined unit at City of Hope. It does not follow, however, that UHW's unit is conforming.

The cases UHW cites provide support only for its uncontested claim that its existing unit is *appropriate*. *See* Request at 7-8. It has offered no support, legal or factual, for the further claim that its unit conforms to the Rule. For example, UHW cites *Specialty Hosp. of Washington-Hadley, LLC*, 357 NLRB 814 (2011) for the proposition that the omission of four technical classifications in an existing unit does not retroactively render that unit inappropriate. *See* Request at 7-8. UHW neglected to mention, however, that the reason the Board found the unit remained appropriate in that case was that the unit "[fell] into the 'existing non-conforming

²³ USW assumes that UHW's elision of these two standards is a mere misunderstanding of law and not an intentional obfuscation.

unit' exception to the Board's Rule. Section 103.30(a)." *Specialty Hosp.*, 357 NLRB at 817.

USW agrees that the Rule does not render UHW's existing unit inappropriate because the "existing nonconforming unit" exception applies.

The evidence for UHW's unit's nonconformity is discussed in detail below. The unit is underinclusive in that it does not include all non-professional classifications at City of Hope.²⁴ It is overinclusive in that it includes skilled maintenance and professional classifications under the Rule. Accordingly, the Regional Director properly found on the record that UHW's unit does not conform to the rule because "it does not include all of City of Hope's employees in any Rule category." Decision at 6. This finding is one of two bases for the Regional Director's conclusion that the Health Care Rule does not mandate the accretion of the food service workers into UHW's existing unit.

a) UHW's Unit Does Not Include All Nonprofessional Classifications at City of Hope

The Office of General Counsel has described a nonprofessional unit as one that "will generally include all service and maintenance employees," and whose job duties are "manual and

²⁴ While UHW has continually referred to its unit as the "Service Unit," which may imply a unit consisting of exclusively nonprofessional workers, its unit clearly includes technical classifications. The Regional Director found that the unit includes classifications "from at least two of the eight enumerated categories: 'technical' employees and 'other nonprofessional' employees." Decision at 6.

A technical unit includes classifications whose "jobs involve the use of independent judgment and specialized training in major health care occupational groups . . . They supply a support role and work in patient care." GC Memorandum 91-4, *supra*, at 3; *see also Barnett Memorial Hospital Center*, 217 NLRB 775, 776 (1975) ("the kinds of employees we would include in the technical unit are those whose specialized training, skills, education and job requirements establish a community of interest not shared by other service and maintenance employees. . . . frequently evidenced by the fact that such employees are certified, registered, or licensed"). *Meriter Hospital, Inc.*, 306 NLRB 598, 599 (1992). Technical positions typically require education, certification, licensure, and/or other registration. *Id.*

Examples of technical positions that are included in UHW's existing unit are Licensed Vocational Nurse ("LVN") I and II, Operating Room Technician, Physical Therapy Assistant, and Dietetic Technician. UX 24; *see Trinity Memorial Hospital of Cudahy*, 219 NLRB 215, 216 (1975). Educational requirements for these positions vary, with LVNs requiring a high school diploma and an accredited LVN course and the Operating Room Technician post high school vocational/specialized training. *Id.* Both the Physical Therapy Assistant and Dietetic Technicians require an associate's degree. *Id.* All of these positions require a license, certification, or registration, and thus fall within the technical unit under the Health Care Rule. *Id.*

routine” rather than “highly skilled or trained.” GC Memorandum 91-4, “Health Care Unit Placement Issues,” at 9 (June 5, 1991). This category of employees “primarily perform manual and routine job functions,” and these positions typically “require[] only minimal qualifications for employment in these positions and whatever training is required is generally acquired in 2 or 3 weeks of on-the-job training.” *Baptist Mem’l Hosp.*, 225 NLRB 1165, 1165 (1976).

The record reflects examples of nonprofessional employees at City of Hope’s Duarte campus that are not included in UHW’s unit. For example, City of Hope has a “Lobby Ambassador” position whose job duties include meeting, greeting, and assisting patients and guests at the hospital. UX 14. This position requires a high school diploma or equivalent and two years of experience in customer service. *Id.* Based on the job description provided in the job posting, this position provides typical customer service that is repetitive and does not require the exercise of discretion or any specialized training. However, it is not included in UHW’s bargaining unit. *See* BX 1(a), App. A.

Similarly, City of Hope has posted a job listing for a “Telerecruiter,” whose job duties include calling, screening, and scheduling blood donors. UX 15. This position also requires only a high school diploma or equivalent and one year of customer service, sales, or telemarketing experience. *Id.* The Telerecruiter’s duties as described in the job description are routine and do not require the exercise of discretion or any specialized training. This position is not included in UHW’s bargaining unit. *See* BX 1(a), App. A.

City of Hope has also posted a listing for a Patient Access Representative III,²⁵ who checks patients in and out, schedules patient appointment, collects copays, and otherwise greets and communicates with patients at the hospital. UX 16. While the position summary indicates

²⁵ While the job listing indicates this position is represented by a collective bargaining agreement, this classification does not appear on Appendix A, which is the list of classifications falling under UHW’s existing unit.

this role “requires a high level of independent judgment” in scheduling patients, this employee still works within “system-specific service lines.” *Id.* It requires only a high school diploma or equivalent, along with two years of experience scheduling in a medical setting and familiarity with medical terminology and EPIC medical records software. *Id.* No specialized training or certification is required to perform the Patient Access Representative III’s job duties. As such, it is likely a nonprofessional classification that is not included in UHW’s bargaining unit list. *See* BX 1(a), App. A.

These classifications are examples, then, of nonprofessional positions that are not included in UHW’s existing bargaining unit. Because UHW does not represent all of the nonprofessional classifications at City of Hope, it is underinclusive as to those workers and does not conform to the Health Care Rule.

b) UHW’s Unit Includes Some but Not All Professional Classifications

A professional unit includes “all employees defined as professional within the meaning of Sec. 2(12) of the Act, except for physicians and registered nurses.” GC Memorandum 91-4, *supra*, at 2. A professional job classification differs from a technical one in that it requires the exercise of discretion and independent judgment in the performance of job duties, and those duties are predominantly intellectual and varied. *St. Barnabas Hosp.*, 283 NLRB 472, 473 (1987).

In *St. Barnabus Hosp.*, the Board found that technologists properly fell within the professional category, overturning the Regional Director’s finding that they were technical employees, when those technologists performed tests on sophisticated equipment, maintained that equipment, instructed others on their use, and worked with little supervision. *Id.*; *see also Barnett Mem’l Hosp. Ctr.*, 217 NLRB 775, 781-82 (1975). Where, as in *St. Barnabus Hospital*,

possession of a college degree was not required but was preferred and highly valued, the level of educational required for a position alone is not determinative as to technical or professional status. *Id.*

The Board now applies a rebuttable presumption that medical technologists are professional employees. *Group Health Ass’n, Inc.*, 317 NLRB 238, 238 (1995). In *Group Health*, the Board described medical technologists as those who “generally engage in a wide array of laboratory testing on various media of patient samples” and “are required to engage in a substantial degree of pre- and post-testing analysis.” *Id.* The Board noted in that case that “the technologists are not mere machine operators.” *Id.* at 241.

Medical technologists represented in UHW’s unit include CT Simulation Technologist, Lead CT Technologist, Histotechnologist, Histotechnologist II, Histotechnologist Lead, Immunohistology Tech Lead, Mammography/Breast Ultrasound Technologist, Mammography Technologist, Mammography/Breast Ultrasound Technologist Lead, MRI Technologist, MRI Technologist Lead, Pathology Technologist, Special Procedures Technologist, Ultrasound Technologist, X-Ray Technologist I, X-Ray Technologist Lead, and X-Ray Technologist II – Comp Tomography Technician. UX 24. All of these positions require post-high school vocational or specialized training and certification, and several of them also require accredited coursework in a specific subject or even an associate’s degree. *Id.* The technologists at City of Hope, as at *St. Barnabus Hospital*, perform tests on sophisticated equipment requiring specialized knowledge and training in their use. *Id.* Many of these employees are also required to perform maintenance and testing on the equipment and to instruct others in their use. *Id.* Some, such as the Histotechnologist Lead, are also “[r]esponsible for the development of new procedures.” *Id.*

According to the presumption laid out in *Group Health*, the technologists at City of Hope are professional employees. Even on the test applicable prior to *Group Health*, the technologists exercise sufficient discretion and independent judgment to qualify as professional employees. They perform tasks such as developing new procedures and educational materials, as well as supervising and training other employees. UX 24. Such job duties are varied and intellectual.

UHW does not, however, represent all the technologists at City of Hope. For example, City of Hope has posted a job listing for the position of Nuclear Med Technologist, Sr. UX 17. This position performs diagnostic imaging and therapeutic procedures. *Id.* This employee is responsible for administering procedures requiring knowledge of anatomy, physiology, and medical equipment. *Id.* The Nuclear Med Technologist Sr also develops staff educational programs and provides technical instruction, as well as maintaining their personal professional growth and development in the field. *Id.* This position requires graduation from a “Nuclear Medicine Program” and five years of experience, as well as several licenses/certifications in the field. *Id.* The Nuclear Med Technologist Sr is not included in UHW’s unit. *See* BX 1(a), App. A.

In conclusion, UHW’s unit includes many professional classifications, along with non-professional and technical positions,²⁶ but it does not include all of the professional classifications. Therefore, it does not conform to the Rule.

²⁶ As mentioned above, UHW’s position is that its existing unit is a combined non-professional and technical unit, not a non-professional, technical, *and* professional unit. Even if it did purport to represent professional employees, too, it is clear, as argued here, that it would be nonconforming because UHW does not represent all professional employees.

c) UHW's Unit Includes Skilled Maintenance Classifications

Under the Rule, skilled maintenance employees are distinct from other classifications in that their work is “on systems and equipment as opposed to involvement in direct patient care.” *Jewish Hosp.*, 305 NLRB 955, 955 (1991).

UHW's unit includes classifications for Facilities Mechanics I, II, III, and Lead. UX 24. The job descriptions for these positions state that their job duties include “services normally performed by these Engineering Trades: Carpentry, Electrical, Automotive Mechanics, Lock, Paint, Preventative Maintenance, Maintenance Routine/Rounds (MR.R.). *Id.* For Facilities Mechanic I and II, a high school diploma is required, with college or trade school preferred, as well as certification or proficiency in at least two trades. *Id.* For Facilities Mechanic III and Lead, master level skills are preferred along with certification or proficiency in three or more trades. *Id.* The Facilities Mechanic Lead is required to have completed college or trade school or equivalent and to be skilled in non-routine functions. *Id.* The Lead position is also responsible for mentoring and assigning work to other Facilities Mechanics. *Id.*

According to these job descriptions, the Facilities Mechanics are not involved in direct patient care. They perform duties in the engineering trades on hospital systems and equipment, and they are not required to have any familiarity with medical equipment or skills related to medical services. In contrast to non-professional employees, the Facilities Mechanics are required to have specialized skills related to their trades even at the Facilities Mechanic I level. The Facilities Mechanics at City of Hope likely qualify as skilled maintenance employees under the Rule. Since UHW's unit includes, then, skilled maintenance employees, it is not a conforming unit of non-professional and technical employees as UHW claims.

B. The Regional Director Properly Found that the Health Care Rule Does Not Apply Because This Is Not an Initial Organizing Attempt or a Petition for a New Unit of Previously Unrepresented Employees, and UHW Has Not Challenged this Finding

The Regional Director rested his decision not to apply the Rule on two bases: (1) that UHW's unit is nonconforming, discussed above, and (2) that this was not an initial representation petition. *See* Decision at 6. UHW made no challenge to the second basis. As such, the Regional Director's Decision should be sustained regardless of whether or not UHW's unit conforms to the Rule. As the Regional Director clearly found, the Rule is inapplicable to the present situation, in which USW seeks only to *continue* representing an established unit of employees with a distinct identity and established bargaining history.

The Board has long recognized that the Health Care Rule applies "only to initial organizing attempts or, where there are existing nonconforming units, to a petition for a new unit of previously unrepresented employees, which would be an addition to the existing units at the Employer's facility." *Crittenton Hosp.*, 328 NLRB 879, 880 (1999); *see also Kaiser Found. Hosp.*, 312 NLRB 933, 934 (1993) ("[b]y its terms, Section 103.30(c) applies only to petitions for 'additional units,' that is, petitions to represent a new unit of previously unrepresented employees, which would be an addition to the existing units at a facility"). Those circumstances are not present here. This is not an initial organizing attempt but instead an inquiry, initiated by the Employer, into whether food service workers who have been represented by USW for the last fifteen years should instead be accreted into an existing unit represented by UHW. This unit clarification petition is also not a petition to create a new unit of previously unrepresented employees. The food service workers have been represented by USW since 2004. *See* BX 2, stip. 15-16; UX 3-10.

Accordingly, the Regional Director was correct to conclude that the Health Care Rule is not applicable here. UHW has not challenged the Regional Director's conclusion that the Rule is inapplicable since this is not an initial organizing attempt or a petition for a group of previously unrepresented employees. The Regional Director's decision can be upheld, then, irrespective of UHW's arguments concerning the character of its existing bargaining unit.

C. Because the Regional Director Did Not Rely upon the “Extraordinary Circumstances” Exception to the Health Care Rule, UHW’s Challenge on that Basis Is Unavailing

The second basis of UHW's Request for Review is that there was an insufficient showing that this situation qualifies for the “extraordinary circumstances” exception to the Health Care Rule. *See* Request at 8-10. However, this was not part of the Regional Director's Decision. The Regional Director did not discuss whether this “extraordinary circumstances” exception applies one way or another, as he found the Rule inapplicable on other grounds, discussed above. *See* Decision at 6-7. Because the Regional Director did not reach this issue, UHW's argument on this point is irrelevant.²⁷ Accordingly, this does not provide a reason to disturb the Regional Director's decision.

IV. CONCLUSION

For the foregoing reasons, the Board should deny the Intervenor's Request for Review of the Regional Director's Decision.

²⁷ As argued in its post-hearing brief, USW contends that “extraordinary circumstances” would apply here if the Rule were deemed applicable, but this point is immaterial here since the Regional Director correctly found that the Rule is inapplicable and therefore did not address this “extraordinary circumstances” exception.

DATED: February 17, 2020

GILBERT & SACKMAN
A LAW CORPORATION

By  _____
J. Morgan Johnson

Attorneys for the Union

DECLARATION OF SERVICE

I hereby certify that, on February 17, 2020, I electronically filed the foregoing:

**UNION'S STATEMENT IN OPPOSITION TO INTERVENOR'S REQUEST
FOR REVIEW**

with the Office of the Executive Secretary of the National Labor Relations Board, using the NLRB's e-filing system.

I also served the above document by electronic mail to:

William B. Cowen
Regional Director
NLRB, Region 21
312 N. Spring Street, Suite 10150
Los Angeles, CA 90012
Email: William.Cowen@nlrb.gov

Bruce Harland
Counsel for SEIU-UHW
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Email: bharland@unioncounsel.net

Peter Finch
Counsel for City of Hope
Davis Wright Tremaine LLP
920 Fifth Avenue Suite 3300
Seattle, WA 98104
Email: PeterFinch@dwt.com

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and was executed by me on February 17, 2020, in Los Angeles, California.



Morgan Johnson